

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

MARK STEVEN MCPHEE,

Defendant-Appellant.

UNPUBLISHED

March 27, 2007

No. 258285

Oakland Circuit Court

LC No. 2004-195312-FH

Before: Owens, P.J., and Kelly and Fort Hood, JJ.

PER CURIAM.

Defendant appeals as of right his jury trial convictions of furnishing alcohol to a minor, MCL 436.1701, fourth-degree criminal sexual conduct (CSC IV), MCL 750.520e, and three counts of third-degree criminal sexual conduct (CSC III), MCL 750.520d. We affirm.

I. Facts

The 16-year-old victim lived with her sister who was married to defendant. The victim's sister was the victim's legal guardian and defendant acted as an authority figure in the victim's life. One evening, defendant came home from work and offered the victim alcohol to drink. The two were alone in the apartment. The victim's sister was out of town. After drinking a significant amount of alcohol, the victim went to the bathroom to vomit. Defendant followed the victim into the bathroom and, despite the victim's protests, removed her shirt and brassiere and proceeded to touch her breasts. The victim attempted to crawl away from defendant, but passed out in the hallway.

The victim awoke in her sister's bed lying on her stomach. Defendant was positioned behind her, holding her legs and pinning her down with the weight of his body. The victim protested as defendant performed oral sex on her, digitally penetrated her, and attempted to penetrate her with his non-erect penis. Defendant released the victim after she threatened to call the police. After initially denying sexual contact with the victim, defendant eventually told investigating officers that he and the victim engaged in consensual sex. The victim testified that shortly after the assault, her sister forced her to write a letter stating that she consented to defendant's sexual contact.

Defendant was charged with one count of furnishing alcohol to a minor, MCL 436.1701, one count of CSC IV (force or coercion), MCL 750.520e(1)(b), and three counts of CSC III,

MCL 750.520d (multiple variables). With respect to the three counts of CSC III, the complaint charged defendant with:

engage[ing] in sexual penetration . . . of [the victim], under the following existent circumstance(s) to wit: defendant effected sexual penetration through force or coercion and/or defendant and victim were related by blood or affinity to the third degree

At trial, defense counsel argued that the sexual contact was consensual. The trial court instructed the jury that it could find defendant guilty of CSC III if it concluded that defendant used force or coercion or that defendant was related to “the complainant by blood or marriage within the third degree as a brother-in-law.” The jury returned a guilty verdict on all three counts of CSC III without any indication of which theory was applied.

II. Analysis

A. MCL 750.520d(1)(d)

Defendant argues that his CSC III convictions should be reversed because, under *Lawrence v Texas*, 539 US 558; 123 S Ct 2472; 156 L Ed 2d 508 (2003), MCL 750.520d(1)(d) violates his substantive due process rights under the Fourteenth Amendment because prohibiting him from having consensual sex with another adult related by affinity infringes on his “liberty and privacy rights.”

Because defendant did not preserve this constitutional argument for appeal, review is for plain error affecting substantial rights. *People v Carines*, 460 Mich 750, 764; 597 NW2d 130 (1999). Reversal is warranted only when plain error resulted in the conviction of an actually innocent defendant or seriously affected the fairness, integrity, or public reputation of judicial proceedings. *Id.* at 763. “We review de novo questions involving the constitutionality of statutes.” *People v Piper*, 223 Mich App 642, 645; 567 NW2d 483 (1997). “[C]ourts must construe statutes as constitutional absent a clear showing of unconstitutionality.” *Id.*

“In evaluating equal protection and substantive due process claims, the first step is to decide which test applies. If the challenged classification affects a fundamental interest or involves a suspect classification, a compelling state interest is required to uphold it.” *People v Sleet*, 193 Mich App 604, 605-606; 484 NW2d 757 (1992). “Otherwise, the classification is to be upheld if it is not arbitrary and is rationally related to a legitimate state interest.” *Id.*

We first note that MCL 750.520d(1)(d) does preclude sexual penetration between persons related by blood or affinity to the third degree even if consensual absent certain exceptions provided for in the statute. Thus, consent is not a defense to a prosecution brought under MCL 750.520d, which provides:

(1) A person is guilty of criminal sexual conduct in the third degree if the person engages in sexual penetration with another person and if any of the following circumstances exist:

* * *

(d) That other person is related to the actor by blood or affinity to the third degree and the sexual penetration occurs under circumstances not otherwise prohibited by this chapter. It is an affirmative defense to a prosecution under this subdivision that the other person was in a position of authority over the defendant and used this authority to coerce the defendant to violate this subdivision. The defendant has the burden of proving this defense by a preponderance of the evidence. This subdivision does not apply if both persons are lawfully married to each other at the time of the alleged violation.

We recently addressed this issue in the context of MCL 750.520e(1)(d) that uses the identical language of MCL 750.520d(1)(d).¹ In *People v Russell*, 266 Mich App 307, 312; 703 NW2d 107 (2005), this Court determined that the identical language “does preclude consensual sexual conduct between two adults related by affinity under certain circumstances.”

Defendant’s argument, based solely on *Lawrence*, that MCL 750.520d(1)(d) violates his constitutional “liberty and privacy rights” is without merit. In *Lawrence*, the adult petitioners were convicted under a Texas statute criminalizing sodomy with a member of the same sex after law enforcement officers observed them engaging in a consensual sexual act in the privacy of their home. *Lawrence, supra* at 562-563. The statute at issue provided, “A person commits an offense if he engages in deviate sexual intercourse with another individual of the same sex.” *Id.* at 563. Without recognizing a fundamental right, the United States Supreme Court held the statute sought to control “a personal relationship that, whether or not entitled to formal recognition in the law, is within the liberty of persons to choose without being punished as criminals.” *Id.* at 567. Applying rational-basis review, the *Lawrence* Court concluded that the statute “furthers no legitimate state interest which can justify its intrusion into the personal and private life of the individual.” *Id.* at 578. The *Lawrence* Court was careful, however, to narrow its holding to the facts of the case stating,

¹ MCL 750.520e(1)(d) provides:

(1)A person is guilty of criminal sexual conduct in the fourth degree if he or she engages in sexual contact with another person and if any of the following circumstances exist:

* * *

(d) That other person is related to the actor by blood or affinity to the third degree and the sexual contact occurs under circumstances not otherwise prohibited by this chapter. It is an affirmative defense to a prosecution under this subdivision that the other person was in a position of authority over the defendant and used this authority to coerce the defendant to violate this subdivision. The defendant has the burden of proving this defense by a preponderance of the evidence. This subdivision does not apply if both persons are lawfully married to each other at the time of the alleged violation.

The present case does not involve minors. It does not involve persons who might be injured or coerced or who are situated in relationships where consent might not easily be refused. . . . The case does involve two adults who, with full and mutual consent from each other, engaged in sexual practices common to a homosexual lifestyle. [*Id.*]

Not only does MCL 750.520d(1)(d) significantly differ from the statute at issue in *Lawrence*, the facts in this case also significantly differ from those in *Lawrence*. In contrast to a consensual sexual relationship between two adults “who, with full and mutual consent from each other, engaged in sexual practices common to a homosexual lifestyle,” this case involved 42-year-old married man’s forced sexual contact with his intoxicated, 16-year-old sister-in-law to whom he acted as an authority figure. The familial relationship, the age discrepancy, the victim’s alcohol consumption, and defendant’s position as an authority figure in the victim’s life certainly situated the victim in a position “where consent might not easily be refused.” *Lawrence, supra* at 578. *Lawrence* does not extend to protect defendant’s actions in this case. Applying rational-basis review, because there is no other authority cited and *Lawrence* does not stand for the proposition that defendant’s asserted right is a fundamental right, we also conclude that MCL 750.520d furthers the legitimate state interests of prohibiting sexual relationships that have traditionally been considered incestuous, as well as protecting the sanctity of the family. Defendant fails to establish “a clear showing of unconstitutionality.” *Piper, supra* at 645.

B. Jury Instructions

Defendant next argues that the trial court erred by failing to (1) provide the jury with a specific unanimity instruction with respect to the subsection on which the CSC III convictions were based and (2) define what constitutes a relationship within the third degree of affinity. We disagree. Defendant failed to properly preserve either of these matters by requesting the mentioned jury instructions or by objecting to the trial court’s instructions on these grounds. *People v Gonzalez*, 468 Mich 636, 642-643; 664 NW2d 159 (2003). Accordingly, defendant must show that any error was plain and that it affected his substantial rights. *Id.*

“This Court reviews jury instructions as a whole to determine if the trial court made an error requiring reversal.” *People v McLaughlin*, 258 Mich App 635, 668; 672 NW2d 860 (2003). “Even if somewhat imperfect, jury instructions are not erroneous if they fairly present the issues for trial and sufficiently protect the defendant’s rights.” *Id.*

“Criminal defendants are guaranteed a unanimous jury verdict under the state constitution.” *People v Gadomski*, 232 Mich App 24, 30; 592 NW2d 75 (1998), citing, Const 1963, art 1, § 14; *People v Cooks*, 446 Mich 503, 510-511; 521 NW2d 275 (1994). As such, trial courts are required to give instructions on the unanimity requirement. *Gadomski, supra* at 30. However, “Michigan criminal juries are not required to unanimously agree upon every fact supporting a guilty verdict.” *Id.* at 31. “More specifically, it is well settled that when a statute lists alternative means of committing an offense, which means in and of themselves do not constitute separate and distinct offenses, jury unanimity is not required with regard to the alternate theories.” *Id.* In *Gadomski*, this Court considered whether a jury must unanimously agree on which aggravating circumstances formed the basis for the CSC I conviction and concluded:

Where there is a single sexual penetration, the various aggravating circumstances listed in MCL § 750.520b; MSA 28.788(2) constitute alternative means of proving a single CSC I offense, and would not support convictions of separate and distinct CSC I offenses. Accordingly, defendant would have been properly convicted of CSC I even if some of jurors believed that he committed the offense solely on the basis of one aggravating circumstance, while the rest of the jurors believed that he committed the offense solely on the basis of another one of the aggravating circumstances. [*Id.* (citation omitted).]

Similarly in this case, each CSC III charge was based on a single penetration and the aggravating circumstances listed in the subsections of MCL 750.520d provided alternative means of proving each CSC III offense and would not support convictions of separate and distinct CSC III offenses. Defendant argues that this case is distinguishable from *Gadomski* because the language of the CSC III statute contains language not found in the CSC I statute; that language being: “and sexual penetration occurs under circumstances not otherwise prohibited by this chapter.” MCL 750.520d(1)(d). Defendant argues that this requires the jury to unanimously agree that defendant was not guilty under any other subsection before determining whether he was guilty under MCL 750.520d(1)(d). We disagree. The language does not require all members of the jury to agree that the defendant was not guilty under any other subsection. It rather requires that any single juror find that the defendant was not guilty under any other subsection before finding the defendant guilty under this subsection. Accordingly, defendant was properly convicted of CSC III even if some jurors believed that he committed the offense on the basis of force or coercion, while the rest of the jurors believed that he committed the offense on the basis of affinity. The trial court was not required to read to the jury a specific unanimity instruction. The general unanimity instruction given was sufficient.

Defendant also argues that the trial court erred in failing to instruct the jury on what constitutes a relationship within the third degree of affinity. However, the court instructed that jury that it needed to find that “the defendant is related to the complainant by blood or marriage within the third degree as a brother-in-law.” This instruction adequately and properly informed the jury on the meaning of relationship within the third degree of affinity.

In any case, defendant cannot show that any instructional error resulted in a conviction of an actually innocent defendant, *Carines*, *supra* at 763, when defendant admitted that he sexually penetrated the victim, his sister-in-law, which is a violation of MCL 750.520d(1)(d).

C. Prosecutor’s Conduct

Defendant also argues that the prosecutor committed misconduct in questioning defendant’s wife. We disagree. Because defendant failed to preserve this issue by objecting to the prosecutor’s allegedly improper conduct, we review for plain error. *People v Matuszak*, 263 Mich App 42, 48; 687 NW2d 342 (2004).

“The test of prosecutorial misconduct is whether the defendant was denied a fair and impartial trial.” *People v Abraham*, 256 Mich App 265, 272; 662 NW2d 836 (2003). “Prosecutorial-misconduct issues are decided case by case, and the reviewing court must examine the pertinent portion of the record and evaluate a prosecutor’s allegedly improper remarks in context.” *Id.* at 272-273. A prosecutor’s good faith effort to admit evidence does not

constitute misconduct. *People v Ackerman*, 257 Mich App 434, 448, 669 NW2d 818 (2003). If the evidence is relevant, “no basis exists to conclude that the prosecutor offered th[e] evidence in bad faith.” *Id.* Evidence is relevant if it has any tendency to make a fact of consequence more or less probable than it would be without the evidence. MRE 401; *People v Small*, 467 Mich 259, 264; 650 NW2d 328 (2002).

Defendant contends that the prosecutor improperly questioned defendant’s wife about whether, in a telephone conversation in the hallway outside the courtroom, she stated that “it’s not a matter of whether they’re going to find him guilty, it’s a matter of how long he goes away for.” Read in context, this question followed questions about whether defendant’s wife believed that the victim was lying and believed defendant was telling the truth. Defendant’s wife testified that she believed that the victim lied when she stated that defendant forced himself on her. The prosecutor then asked her if she believed that defendant was guilty. She answered, “I didn’t say that.” The question at issue directly followed. Read in context, the answer elicited was relevant to the witness’s credibility and, by extension, to the victim’s credibility as well. Therefore, the question was not improper.

Defendant also contends that the prosecutor improperly questioned defendant’s wife about defendant’s inability to achieve an erection. However, testimony in that regard was also relevant. The victim had testified that defendant tried to penetrate her with his penis, but it was not erect. Thus, the testimony was relevant in that it corroborated the victim’s testimony.

Because the complained of testimony was relevant, defendant has failed to show that the prosecutor elicited it in bad faith. *Ackerman, supra* at 448. Therefore, defendant’s prosecutorial misconduct argument is without merit.

Affirmed.

/s/ Donald S. Owens
/s/ Kirsten Frank Kelly
/s/ Karen Fort Hood